"little reliable 'hard' information." NCCB v. FCC, 555 F.2d 938, 956 (D.C. Cir. 1977). The Supreme Court commented that "the Commission did not find that existing co-located newspaper-broadcast combinations had not served the public interest. or that such combinations necessarily 'spea[k] with one voice' or are harmful to competition." FCC v. NCCB, 436 U.S at 786 (internal quotation marks omitted). The Court characterized the Rule as merely "reasonable" and the Commission's predictive judgment "rational." Id.

This deferential standard of review was based on the perception that there was functional scarcity in the broadcast media. In Red Lion, the Supreme Court upheld the constitutionality of the Commission's "fairness doctrine," pursuant to which broadcasters were required to present a balanced discussion of matters of public concern. 395 U.S. at 369. The Court focused on the scarcity ofbroadcast frequencies, finding that

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.

Id. at 388-89. The Court further reasoned that "[b]ecause of the scarcity [in the broadcast spectrum], the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." Id. at 390. Subsequent cases confirm that broadcast spectrum "scarcity" is the doctrinal justification for a more lenient standard of review than would otherwise be applied to restrictions on speech like the Rule. See, e.g., Turner I, 512 U.S. at 640 (essential to the Red Lion doctrine are the "special physical characteristics of broadcast transmission"); FCC v. League of Women Voters, 468 U.S. 364, 377 (1984); Metro Broad., Inc. v. FCC, 497 U.S. 547, 566-67 (1990), overruled on other grounds, Adarand

Constructors, Inc. v. Pena, 515 U.S. 200 (1995); News America Publish., Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) ("The Supreme Court has rested this lesser protection on the scarcity of broadcast frequencies . . . and has recognized that new technology may render the doctrine obsolete") (internal quotations and citations omitted); Time Warner Entertainment v. FCC, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (per curiam) (Williams, J., dissenting).'

Since the scarcity rationale was first invoked. the Supreme Court has recognized that subsequent technological developments might overtake the doctrine. "[T]he broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S 94, 102 (1973). Thus, the Supreme Court has expressly stated its willingness to reconsider the Red Lion standard upon "some signal from Congress or the FCC that technological developments have advanced so far tha[redacted]on of the system of broadcast regulation may be required." FCC v. League of V ,468 U.S. 364, 376-77 n.11 (1984). See also Arkansas AFL-CIO v. FCC, 11

4 The Supreme Court has recognized that the "pervasiveness" of and children's unique access to the broadcast medium justified the Commission's prohibition on indecent material during hours when children might be listening or watching. FCC v. Pacifica Found., 438 U.S. 726,748-SO (1978) (radio); see also Denver Area Educ. Telecommunications Consortium v. FCC, 518 U.S. 727 (1996) (applying Pacifica rationale to cable television). However, this rationale for regulation has never been accepted except in the context of limitations on indecent expression, which are not implicated here. FCC v. League of Women Voters, 468 U.S. 364,380 n. 13 (1984) (overturning FCC regulation prohibiting noncommercial stations from presenting editorials and distinguishing Pacifica because "we are faced not with indecent expression" and "no claim is made by the Government that the expression of editorial opinion by noncommercial stations will create a substantial 'nuisance' of the kind addressed in [Pacifica]"). Thus, the "pervasive nuisance" rationale does not provide a constitutional theory in support of a lenient standard of review for broadcast ownership -- as opposed to decency -- restrictions.

F.3d 1430. 1443 (8th Cir. 1993) (Arnold, J., concurring) (developments since Red Lion "raise a significant possibility that the First Amendment balance struck in Red Lion would look different today"); Syracuse Peace Council v. FCC, 867 F.2d 654,681 (D.C. Cir. 1989) (Starr, J., concurring) ("[U]nder the Red Lion framework. . . the constitutionality of the fairness doctrine is linked in part to technological developments (and behavior) in the communications marketplace."); Branch v. FCC, 824 F.2d 37, 50 (D.C. Cir. 1987) (concluding that the FCC has already sent the "signal" mentioned in FCC v. League of Women Voters by deciding that the fairness doctrine was unconstitutional and should be abandoned); News America Publ'g, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).

B. The Commission has recognized the marketplace changes and eliminated other structural rules.

The Supreme Court's market prediction has been realized. As demonstrated in Section V, since Red Lion was decided in 1969 and the Rule was promulgated in 1975, the technology for the delivery of video programming has undergone a veritable revolution. The dynamism and rapid development in the market for broadcast and other video program delivery systems have undermined the scarcity and diversity rationales originally invoked to justify the newspaper-broadcast cross-ownership rule.

The Commission itself has recognized these changes in liberalizing other ownership and structural rules designed to enhance diversity and/or increase competition in the broadcasting industry. Indeed, such revisions are constitutionally and statutorily required where, as here, the passage of time has undermined the original justification for a rule. Meredith Corp. v. FCC, 809

F.2d 863.874 (D.C. Cir. 1987); Syracuse Peace Council, 2 FCC Rcd. 5043, ¶ 8 n.8 (1987). In each instance, the Commission found that the relevant broadcast market had developed so fully. and diversification of programming was so extensive, as to require repeal of the restrictive ownership or programming rule under consideration. Tribune submits that these same findings require a similar repeal or liberalization of the Rule.

1. Reconsideration of the Fairness Doctrine.

In the mid 1980s, the Commission reconsidered the constitutionality of the fairness doctrine, the Commission's ultimate attempt to ensure viewpoint diversity in programming. In response to a directive from the D.C. Circuit, the Commission issued an order that expressly found the fairness doctrine unconstitutional based on the "explosive growth in the number and types of information sources available in the marketplace" such that "the public has 'access to a multitude of viewpoints without the need or danger of regulatory intervention.'" Syracuse Peace Council, 2 FCC Rcd. 5043, ¶¶ 4, 64 (1987) (quoting Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 142,224 (1985)). The Commission concluded that "[t]o the extent that the [Supreme] Court is concerned about numerical scarcity in [broadcasting]. . . . with the explosive growth in the number of electronic media outlets in the 18 years since Red Lion, there is no longer a basis for this concern." Syracuse Peace Council, ¶ 37 n. 106.

2. **1984** Television Deregulation Order.

At approximately the same time, the Commission eliminated several policies and rules regarding programming and license renewal processing, including a policy requiring full Commission review of any television station renewal that reflected "less than five percent local programming, five percent informational programming (news and public affairs) or ten percent total non-entertainment programming." Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 98 F.C.C. 2d 1075, ¶ 5 (1984) ("Television Deregulation Order"). The Commission found that market forces would stimulate the desired mix of informational, local and non-entertainment programming without regulatory intervention, in part because

> Many new video technologies such as subscription Television (STV), Multipoint Distribution Service (MDS), Satellite Master Antenna Television (SMATV). Low Power Television (LPTV), Direct Broadcast Satellite (DBS), Multi-Channel MDS (MMDS) and Instructional Television Fixed Service Stations (ITFS) have begun, or are just beginning, to assert themselves in the marketplace . . . . The emergence of these new technologies, coupled with the continued growth in the number oftelevision stations, will create an economic environment that is even more competitive than the existing marketplace. Given the market-based demand for these types of programming . . . this increased level of competition can. in our view, only further ensure the presentation of sufficient amounts of such programming.

Id. at 1085-86, ¶¶ 20-21.

3. **Repeal of the Rules Designed to Curb the Power of Broadcast Networks.**

In 1994 and 1995, the Commission repealed its financial interest and syndication ("fin/syn") rules as well as its prime time access rule ("PTAR"). These rules, contemporaries of the newspaper-television cross-ownership rule, were similarly designed to protect competition and the marketplace of ideas by placing broad constraints on the financing, ownership and programming practices of the television networks. The Commission reconsidered these rules and determined that, given competitive conditions in the television marketplace, they should be repealed in their entirety. See PTAR Report and Order, 11 FCC Rcd. 546 (1995); Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd. 3282, ¶¶ 1, 3 (1993) ("Fin/Syn Second R&O"). In so doing, the Commission recognized the dramatic changes in the marketplace since their adoption, including the fact that network audience share had declined greatly, cable and independent television had grown significantly, competition among the three established networks and the Fox network had become intense, and first-run distribution had become a fully comparable alternative to network distribution for program producers. PTAR Report and Order, 11 FCC Rcd ¶ 21. The increased competition facing the networks and the new conditions in the television programming market eliminated the danger that repeal of the fin/syn rules or PTAR would impair the competition and diversity goals of these rules. Id. ¶¶ 3, 20; Fin/Syn Second R&O, ¶ 12.

4. Other Broadcast Ownership Rules.

The Commission has also liberalized other subsections of its broadcast ownership rule and/or their corresponding waiver policies in response to changes in the media marketplace. For example, in 1989 the Commission relaxed the waiver policy associated with its one-to-a-market rule that generally prohibited the common ownership of radio and television stations in the same market. In so doing, the Commission found that "circumstances have changed substantially in the eighteen years since [the rule was adopted] . . . . [T]oday there are many more outlets for information and viewpoints throughout all types of markets than there were in 1970" and "that the increased availability of broadcast outlets in large local markets has reduced the potential risk of harm to competition that would be caused by relaxing or modifying the radio-television cross-ownership rule in such markets."[5] Under the "case-by-case" standard adopted in this proceeding, the Commission now routinely grants permanent one-to-a-market waivers permitting the common ownership of a television station and up to four radio stations. See e.g., BREM Broadcasting, 9 FCC Rcd. 1333 (1994). Moreover, the Commission is currently considering the elimination or further relaxation of the one-to-a-market rule and has granted conditional waivers permitting the common ownership of a television station and as many as eight radio stations.[6]

The Commission again "recognized the need to adapt our rules to the changing marketplace" when it liberalized the number of AM and FM stations an entity could own locally, recognizing that "[t]he explosion of radio and other media since [it first applied local restrictions in 1938] has provided local consumers with a wide range of media choices and presented radio owners with multiple competitive challenges."[7] While the Commission's rules originally permitted the common ownership of only one AM and one FM radio station in the same market, the 1992 proceeding relaxed that restriction and permitted the common ownership of 2 AMs and 2 FMs in a market, subject to an audience share limit. Id. The Telecommunications Act of 1996 further relaxed the local radio ownership limit permitting up to 8 stations per market to be commonly

---

[5] Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, Second Report and Order, 4 FCC Rcd. 1741, ¶¶ 24, 36 *(1989)* ("1989 Multiple Ownership Report").

[6] See Stockholders of Infinity Broadcasting Corp., 12 FCC Rcd. 5012, ¶¶ 95, 97 (1996).

[7] Revision of Radio Rules & Policies, Report and Order 7 FCC Rcd. 2755, ¶¶ 35-36 (1992).

owned. Newspaper/Radio Cross-Ownership Waiver Policy, 11 FCC Rcd. 13003, 13009 (1996). The 1996 Act also eliminated the national numerical limitations on the number of radio or television stations an entity could own and also repealed the statutory ban on local TV/cable cross-ownership. These ownership rule changes, initiated by the Commission and expanded by Congress, reflect the dramatic changes in the media marketplace over the previous 23 years.

C. With the liberalization and elimination of the Commission's other broadcast ownership and programming rules, the Rule now impermissibly and unconstitutionally singles out newspapers.

The Commission's continued retention of the Rule, complete with its liberalization of its other ownership and programming rules, has had the additional effect of disproportionately burdening newspapers. Ordinarily, the press is entitled to the highest degree of constitutional protection. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Notwithstanding this general principle, in FCC v. NCCB, the Supreme Court countered the argument that the Rule "singled out" newspapers in violation of the First and Fifth Amendments by pointing out that "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple-ownership tules." FCC v. NCCB, 436 U.S. at 801. Since that decision, as noted above, most of the Commission's other restrictive ownership rules have been liberalized -- changes that have had the effect of unfairly putting newspapers at a competitive disadvantage vis-a-vis other comparable media outlets. In this transformed regulatory environment, the Rule's discriminatory impact on the press can no longer be constitutionally justified.

D. At a minimum, the Commission would be required to show that the Rule can withstand intermediate scrutiny, in that it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.

In the absence of scarcity, the Rule and its related waiver policy, which is tantamount to a virtual prohibition on cross-ownership, would be subject to heightened First Amendment scrutiny.[8] Two recent Court of Appeals decisions demonstrate that, if reviewed today, the Rule would be upheld only if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. Both decisions involved challenges to section 533(b) of the Cable Franchise Policy and Communications Act of 1984, which made it unlawful for a telephone company to provide video programming in its telephone service area. In both decisions, the

---

[8] The NOI succinctly observed that "[a]lthough the Commission, in adopting the [R]ule, noted its expectation that there could be meritorious waiver requests, it set forth very stringent waiver criteria. As a result, only two cases, both involving television/newspaper combinations, have been found to warrant permanent waiver of the [R]ule." NOI ¶ 28. The NOI understates reality -- the potential for a permanent waiver to permit the new common ownership of a newspaper and a television station under the FCC's current waiver policy was and is a nullity. Despite the Commission's recognition that there could be meritorious waiver requests in the Second Report and Order originally adopting the Rule, the Commission's waiver cases reveal that absent a showing of imminent financial collapse and a likely loss of Service, no showing of substantial benefits to the public or the absence of any real harm to the diversity or competition in a market can be expected to result in permanent relief from the Rule. See, e.g., Hopkins Hall Broad., Inc., 10 FCC Rcd. 9764, ¶¶ 10-15 (1995) (public interest benefits from combination are not considered); Capital Cities/ABC, 11 FCC Rcd. 5841. ¶¶ 82-83 (1996) (pre-existing radio-newspaper combinations granted only six-month temporary waivers despite minimal impact on market from common ownership); Shareholders of Renaissance Corp., 12 FCC Rcd. 11866, ¶¶ 49-55 (1997) (only one-year temporary waiver warranted despite nondominance of television and newspaper proposed to be commonly owned and presence of significant public interest benefits and substantial number of voices in market). The Commission's recent decision to permit a new radio-newspaper combination does not alter this analysis. See Columbia Montour Broadcasting Co., Inc., FCC 98-114, ¶ 20 (released June 11, 1998) (recognizing the likely loss of AM service without permanent waiver).

courts applied intermediate scrutiny and held that the statutory prohibition on cross-ownership of a telephone and a cable company violated the First Amendment. These cases demonstrate that the federal courts will henceforth demand a close **nexus** between any ownership rule and the purported diversity interest to be served. See US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1995); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994).

Applying intermediate scrutiny, the Ninth Circuit concluded that the cross-ownership ban was unconstitutional because there was insufficient evidence to demonstrate that the ban would foster competition in the cable industry or promote diversity in programming, and that less restrictive means of achieving diversity were available. US West, Inc., 48 F.3d at 1101-1106. The Fourth Circuit reached similar conclusions. In Chesapeake & Potomac, 42 F.3d at 198-203, the court observed, after looking at the history of Section 553(b), that "the FCC's reasoning does not indicate that attention was devoted to the possibility of other, less drastic regulatory schemes that might achieve the substantial government interests enunciated above." As these cases illustrate, **once** the scarcity rationale is eliminated, the Rule must be based on substantial evidence that the particular restriction will promote a significant government interest without suppressing substantially more speech than is ***necessary.*** Given today's marketplace realities, the FCC will **be** unable to show that the competitive market is incapable of creating diversity in local news and public affairs programming, and that the Commission is required to **ban** speech by the publisher of a local newspaper over radio and television in order to preserve competition and program diversity.

III. THE COMMISSION'S AUTHORITY TO MAINTAIN ITS OWNERSHIP RULES HAS BEEN LIMITED BY SECTION 202(h) TO CONSIDERATION OF WHETHER COMPETITION HAS RENDERED ITS OWNERSHIP RULES UNNECESSARY

In its enactment of Section 202(h) of the Telecommunications Act of 1996 (the "Act"), Congress, too, evinced its conclusion that scarcity no longer provides a basis for Commission regulation, and that achieving diversity in the market should be left to competitive forces. Section 202(h) directs the Commission to determine whether its broadcast ownership rules are "necessary in the public interest as the result of competition."[9] The unambiguous language of the Act requires the Commission to assess the impact of competitive developments in the market in determining whether its broadcast ownership rules continue to be in the public interest.

Nonetheless, the Commission has expressed its intention to determine whether its ownership rules "are no longer in the public interest as we have traditionally defined it in terms of our competition and diversity goals." NOI ¶ 3. Such an interpretation of Section 202(h), to the

---

[9] Section 202(h) provides:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). As noted in the NOI, the rules subject to biennial review include rules pertaining to cable as well as broadcast cross-ownership.

extent that it does not recognize Congress's clear directive to focus on competitive market forces, would be impermissible under Chevron U.S.A.. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984).[10] Accordingly, the Commission can no longer maintain its regulatory ownership restrictions simply by invoking its "traditional" prediction that more voices guarantee more diversity. As demonstrated by Tribune's comments. Congress's change in focus is readily understandable. The incredible array of media outlets currently available in the market -- outlets that have produced endless information of every variety completely independent of Commission regulations designed to enhance diversity – has rendered the Commission's traditional approach obsolete.

Both principles of statutory construction and the legislative history of the Act make clear that Congress intended for the Commission to change its traditional regulatory approach to the broadcast industry by placing its principal reliance on market forces. First, by explicitly emphasizing competition and omitting any mention of diversity, the plain language of Section 202(h) clearly signals this revised approach. At the time Congress enacted Section 202(h), it certainly was aware of the fact that "[f]or more than half a century, the Commission's regulation of broadcast service has been guided by the goals of promoting competition and diversity," NOI ¶ 4, and that the twin goals of competition and diversity together comprised what the Commission has viewed as its "public interest mandate." Id. Nonetheless, Congress

[10] In Chevron, the Supreme Court set out the now familiar two-step approach an agency must take when interpreting a statute. First, the agency must ask "whether Congress has directly spoken to the precise question at issue." Id. at 842. If so, "that is the end of the matter; for the . . . agency[] must give effect to the unambiguously expressed intent of Congress." Id at 842-43. Only if "the statute is silent or ambiguous with respect to the specific issue," may the agency propose its own interpretation. Id. at 843.

conspicuously made no mention of "diversity" in Section 202(h), and instead directed the Commission to determine whether its ownership rules were still necessary "as the result of competition."[11] Given this language, it should be inferred that Congress intended the Commission to focus on market forces in evaluating the continuing need for its rules and to discard its traditional insistence on preserving the number of separately owned voices in the name of diversity.

Second, the legislative history of the Act clearly reveals Congress's intent that the Commission change its regulatory approach in evaluating the continuing need for its broadcast ownership rules. The House Report, prepared by the Committee on Commerce, noted that "[t]he audio and visual marketplace . . . has undergone significant changes over the past fifty years and the scarcity rationale for government regulation no longer applies." H.R. Rep. No. 104-204, at 54 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 18. The Report continued:

---

[11] The Commission's suggestion that Section 202(h) permits it to undertake a far-reaching diversity analysis is inconsistent with the statutory construction principle expressio unius est exclusion alterius, or, the "mention of one thing implies the exclusion of another thing." Ethyl Corp. v. EPA, 51 F.3d 1053, 1061 (D.C. Cir. 1995) (internal quotation omitted). The expressio unius maxim has particular force here because Congress, in enacting other sections of the Act with purposes similar to Section 202(h), did make specific reference to the "diversity" aspect of the Commission's public interest standard. See Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); Halverson v. Slater, 129 F.3d 180, 186 (D.C. Cir. 1997) (recognizing this principle as a rule of statutory construction). For example, Congress directed the Commission to conduct a proceeding to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services and information services. See 47 U.S.C. § 257(a). Congress specifically instructed the Commission that, in executing its statutorily mandated review in that regard, it "shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, conveniens and necessity." Id. § 257(b) (emphasis added).

> Today, there are in excess of 11,000 radio stations and over 1,100 commercial television stations, a 30 percent increase in the number of stations from just ten years ago. In addition, a fourth network has developed and two new networks are being launched. There is also competition From cable systems as suppliers of video programming. Cable systems pass more than 95 percent of all U.S. television households and 65 percent of U.S. television households subscribe to cable. In addition, other technologies such as wireless cable, low power television, backyard dishes, satellite master antenna television service (SMATV) and video cassette recorders (VCRs) provide consumers with additional program distribution outlets that compete with broadcast stations. To date, twenty four telephone companies have applied to provide "video dialtone service" to customers over phone lines. . . . This explosion of programming distribution sources calls for a substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and competes.

H.R. Rep. No. 104-204, at 54-55 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 18-19. Having acknowledged the striking changes in the level of competition in the media marketplace over the past fifty years, the Committee concluded:

> To ensure the industry's ability to compete effectively in a multichannel media market **Congress and the Commission must reform Federal policy and the current regulatory framework to reflect the new marketplace realities**. To accomplish this goal, **the Committee chooses to depart from the traditional notions of broadcast regulation and** to relv **more on competitive market forces**.

H.R. Rep. No. 104-204, at 55 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 19 (emphasis added). The Committee report thus confirms Congress's intent that the Commission "depart from" its "traditional notion" of the public interest and instead focus on "competitive market forces" in its approach to regulating the broadcast industry. This change in focus is not merely sensible; in light of the development in all relevant markets, it is constitutionally required

Both the plain language and legislative history of Section 202(h) unambiguously express Congress's intent that the Commission rely on the marketplace in its regulatory approach to the broadcast industry. The Commission must give effect to Congress's intent by examining the changes in the media marketplace and repealing or modifying those rules no longer necessary as a result of those changes. In so doing, the Commission may not simply cling to its traditional inclination to maintain separately owned outlets solely for the sake of diversity. Congress has clearly indicated that ordinarily, competition will provide adequate protection of the public interest. Thus, any decision to depart from reliance on market forces must be accompanied by a complete explanation of the diversity objective sought to be achieved and a clear demonstration that market forces will not produce the desired objective.

IV. THE COMMISSION HAS AN INDEPENDENT OBLIGATION TO RECONSIDER A RULE WHEN THE FACTUAL PREDICATE UNDERLYING THE RULE IS NO LONGER VALID

Congress has made clear that, given the competitive developments in the media market, it no longer believes that scarcity justifies the Rule. Tribune's own showing in these Comments, see Section V, *infra*, further illustrates this conclusion. This well-documented, dramatic change in the commercial marketplace has undermined the key factual predicate for the Rule, namely that scarcity in the broadcast market required intrusive and draconian government intervention to protect the public's access to diverse viewpoints. Since that factual (and legal) predicate for the Rule is no longer valid, the Commission has an independent obligation under established judicial precedents to reconsider – and eliminate – the Rule. See Bechtel v. FCC, 957

F.2d 873 (D.C. Cir. 1992) ("Bechtel I"); Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979) (per curiam).

In Bechtel I, a license applicant claimed that "the reality of the current regulatory environment" was at odds with the continued application of the Commission's integration policy pursuant to which licenses were awarded between competing applicants. 957 F.2d at 880-81. In ruling that the Commission was required to respond to the applicant's arguments about changed circumstances, the D.C. Circuit concluded that "it is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision . . . has been removed.'" Id. at 881 (quoting WWHT, Inc. v. FCC, 656 F.2d 807.819 (D.C. Cir. 1981)). The court explained that the Commission's "necessarily wide latitude to make policy" was accompanied by a "correlative duty to evaluate its policies over time." Id. at 881; see also National Broad. Co. v. United States, 319 U.S. 190, 225 (1943) ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.").

Similarly, in Geller, the D.C. Circuit concluded that where a significant factual predicate of a prior decision to promulgate a rule has been removed, the agency may be forced by a reviewing court to address the continued validity of the rule. 610 F.2d at 979-80. Thus, where allegations "alert the Commission to the possibility that the regulations . . . lacked a nexus with the public interest," the Commission must reevaluate those regulations. Id. at 980; see ah Cincinnati Bell Tei. Co. v. FCC, 69 F.3d 752, 767 (6th Cir. 1995); Eagle-Picher Indust., Inc. v. EPA, 759 F.2d 905, 913 (D.C. Cir. 1985) (where "events occur or information becomes available after the statutory review period expires that essentially create a challenge that did not previously exist," the agency must reconsider its rule). As demonstrated at length below, changes in the media marketplace have undermined key factual predicates underlying the Rule, requiring the Commission to repeal or substantially liberalize it.

\ COMPETITIVE CHANGES I THE MARKETPLACE REQUIRE THE EI NATION)F THE RUI ; OR THE RELAXATION OF THE WAIVEI POLICY IN THE LARGEST MARKETS

Tribune wholeheartedly endorses the Newspaper Association of America's ("NAA's") Petition for Rule Making supporting the elimination of (or at least the liberalization of) the restrictions on the common ownership of daily newspapers and radio and television stations located in the same market. Tribune submits that the breathtaking changes in the mass media marketplace since the Rule was originally adopted require nothing less.

As the NAA Petition demonstrates, the media marketplace has been transformed by developments unimaginable at the time the Commission adopted the Rule in 1975 -- developments that have clearly eliminated the diversity and competitiveness concerns underlying the Rule. The sheer volume and extent of these changes can hardly be overstated. These changes include the development of new technologies that substantially increase the amount of news and entertainment programming available in the market. These technologies, which range from VCRs to cable to DBS and the Internet, combined with an increase in the number of cable programming services, over-the-air television and radio stations licensed by the Commission, have led to an information explosion in the market. In this setting, the Commission's original concerns about the ability of a newspaper-television station **owner** to exercise monopoly power or somehow control the marketplace of ideas seem as antiquated as a television set or computer from 1975 would be today.

Among the marketplace changes highlighted by the NAA, a number warrant special mention:

> the number of licensed television stations **has grown** by more than SO percent, with the majority of U.S. television households in markets served by 10 or more stations. **This** growth has largely occurred in the UHF band -- the number of commercial UHF stations has more than tripled since 1975, growing from 192 in 1975 to 619 by the end of 1997;[12]
>
> the number of licensed radio stations in the **U.S. has** increased by nearly SO percent since 1975, including doubling the number of FM stations. Driven by this increase in the number of stations, there has been a dramatic increase in program formats -- the number of formats tracked by **Broadcasting & Cable** grew from just 15 in 1982 to 91 by the end of 1996;[13]
>
> the increase in the number of licensed television stations has been accompanied by the emergence of **a** fourth major over-the-air network **(Fox)** and the start-up of three other over-the-air networks (WB, UPN and the soon-to-be-launched **Pax** Net);

- cable television has forever changed the **way** in which most Americans receive their video programming. Cable television passes almost 97 percent of all **U.S.** households with over 66 percent of those households now subscribing. **This** compares to the 17 percent penetration rate at the time the Rule **was** adopted. In total, the number of television households subscribing to cable **has** jumped from approximately 8.5 million in 1975 to approximately 64 million in 1997 (representing nearly an 8-fold **increase);**[14]

---

12 1997 Broadcasting & Cable Yearbook at I-45.

13 FCC Mimeo, Broadcast Station Total as of March 31, 1997 (April **7,** 1997); 1996 **Broadcasting & Cable Yearbook,** at B-671.

14 **Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,** Fourth Annual Report **("1998 Annual Report"), FCC** 97-423, ¶¶ 14-15 (Jan. 13, 1998).

in addition to the increase in licensed over-the-air stations, over **58** percent of cable subscribers are sewed by systems with **54** or more channels while an additional **40** percent of cable subscribers (equaling approximately **25.6** million television households) are served by systems with 30 or more channels).[15] This compares to the market in **1975** when most television markets received **5** or fewer channels of video programming. Virtually all these systems also have public access channels – channels that permit members of the public to express their views on local issues of concern;

the increase in the number of available cable channels has led to the proliferation of national and regional cable networks — numbering **126** by the end of **1996**;[16] these basic networks, which for all practical purposes did not exist at the time the **Rule** was adopted, have increasingly taken viewers away from the over-the-air industry – accounting for over **36** percent of total household viewing hours in the **1996-97** season.[17] The trade press recently highlighted yet another week where more households tuned into basic cable networks than to the Big Four broadcast networks;[18]

direct broadcast satellites, non-existent at the time the **Rule** was adopted, offer multiple channels of programming (typically well in excess of 100) to an estimated **5.1** million subscribers as of June **1997**;[19]

VCR penetration exceeded **80** percent as of the end of **1997** and videocassette rentals and sales revenues exceeded **$16** billion for that period. By contrast, the home video industry was virtually non-existent in **1975;**

almost overnight, the Internet has emerged as a source of virtually limitless information, with penetration estimated at 30 percent nationally today and projected to increase rapidly in the next **5** years. No report of today's business news is complete without the announcement of some new

[15] <u>1998 Annual Report</u>, ¶¶ **15-17**

[16] <u>1998 Annual Report</u>, ¶¶ **18-19.**

[17] <u>Id</u>.

[18] <u>See</u> "Basic Cable Tops Big Four," <u>Broadcasting & Cable Daily Fax</u>, July 1,1998 (during week of June **22-28,** more homes tuned **to** programs on basic cable networks than from the Big Four networks).

[19] <u>1998 Annual Report</u>, ¶¶ **55-56** and Table C-3

investment by **a** large company seeking to better position itself in tomorrow's Internet-dominated world;[20]

- traditional and modern media have converged as newspapers are published and programming is broadcast on-line, creating a world where content from all media (print, broadcasting, on-line) have merged into a single platform.

These changes, many of which have been acknowledged by the Commission in liberalizing or eliminating other structural ownership rules designed to enhance diversity and/or competition, should also be recognized in this proceeding.[21] **As** the Commission staff recognized **as** early as **1991**, "in the new reality of increased competition[,] regulations imposed in a far less competitive environment to curb perceived market power or concentration of control over

---

[20] See, e.g., "All Clicks head to Disney," **Broadcasting & Cable Daily Fax**, June **19, 1998** (documenting Disney's recent-investment in Infoseek, a move designed to "leverage Disney entertainment, news and sports assets online with the Infoseek search engine"); "Road Runner makes deals and speeds up installs," **Electronic Media**, June **20, 1998** (describing separate **$212.5** million investments by Microsoft and Compaq in the Road **Runner** high speed Internet service).

[21] The Commission has "found that each of these new services also were contributing significantly to the diversity of information available to the public," and that

> in terms of viewpoint diversity, the market includes a wide variety of active, energetic organs engaged in the dissemination of ideas, and that these instruments include not simply television and radio, also cable, video cassette recorders, newspapers, magazines, books, and when they **are** in operation, MDS, STV, **LPTV,** and DBS, all of which should be considered when evaluating diversity concerns.

Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcasting Stations, 100 F.C.C. 2d **17, 26 (1984) ("1984 Multiple Ownership Report").** The Commission has also stated that "it is unrealistic to consider broadcast television station ownership in isolation when analyzing outlet diversity, and we propose **to** take other media into more specific account in assessing diversity." **Review of the Commission's Regulations Governing Television Broadcasting** Further Notice of Proposed Rule Making, **10** FCC **Rcd. 3524, ¶ 64 (1995).** Even the Supreme Court has commented that "[w]ith the capacity to carry dozens of channels and import distant programming signals via satellite or microwave relay. today's cable systems are in direct competition with over-the-air broadcasters as **an** independent **source** of television programming." **Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 627 (1994).**

programming are no longer justified and may impede the provision of broadcast services."[22] The Commission should liberalize the Rule to permit over-the-air broadcasters and newspapers to pursue efficient ownership combinations in today's multi-media environment, combinations that in the largest markets pose no threat to competition for advertising revenue or to the marketplace of ideas. As demonstrated above, the failure to take such action would raise serious constitutional concerns because the Rule singles out newspapers and prevents their full participation in the media marketplace.

In considering the impact of these new technologies, the Commission should not focus on whether all of them are available to every American. Instead, the Commission should focus on whether these new technologies provide a competitive substitute for over-the-air television. If the over-the-air television industry is to remain economically competitive and continue to provide high quality entertainment, news, children's and public affairs programming, it must be able to compete for the attention of all Americans, not just for the attention of those unable to afford cable or DBS or the Internet. Two recent articles underscore the competitive inroads the cable industry has made against over-the-air broadcasters. First, an industry publication recently noted that the largest basic cable networks were individually worth between $5 to $6 billion, which compared favorably to the $4 to $5 billion value for any of the four broadcast networks.[23] Second, just yesterday, the President of NBC confirmed that the network

---

[22] Broadcast Television in Multichannel Marketplace, 4 FCC Rcd. 3996, 3999 (OPP Working Paper No. 26, released June 27, 1991).

[23] Topping the list of basic cable networks was ESPN, which projects $1.155 billion in 1998 total net revenue, including $420 million in advertising revenue and $580 million in licensing fees. Cable Program Investor, Paul Kagan Associates, February 24, 1998. Disney now uses ESPN as (continued...)

and its multi-billion dollar parent, General Electric, will pursue an alliance or merger with a cable network (and its dual income stream of subscriber fees and advertising revenues) because "the broadcast-TV business – with its reliance on advertising as the only major source of revenue -- is no longer sustainable."[24] The success of basic cable networks could hardly have been predicted at the time the Rule was adopted and represents a fundamental shift in the way Americans receive video programming. This competition needs to be recognized by liberalizing the Rule in order to ensure that the over-the-air industry can continue to compete in today's marketplace.

The Commission recognized its duty to calibrate its regulations in response to changed market circumstances and the impact of new technologies 14 years ago when it liberalized the so-called Seven Station Rule that limited the number of AM, FM and television stations a single entity could own nationally, finding that "we would be derelict in our responsibilities to the public interest were we to ignore the developments now occurring, and those evidently on the way."[25] The pace of change since 1984 has increased exponentially. What is on the way today is the complete convergence of media, with the introduction this year of a single device that delivers not only over-the-air television and cable programming, but also the Internet, with its online newspapers, magazines, streamed video programming and other traditional print media. As with cable, nothing will distinguish over-the-air programming from Internet programming, and the erosion of the over-the-& audience will only be exacerbated. By taking steps to permit the over-

---

[23] (...continued)
the flagship of its sports programming interests, a decision that recognizes the tremendous brand recognition that ESPN has developed.

[24] "NBC President Says Alliance Is More Likely," <u>The Wall Street Journal</u>, July 20, 1998 at B2.

[25] <u>1984 Multiple Ownership Report</u>, 100 F.C.C. 2d at ¶ 40.

the-air industry to compete on a more level playing field with these new technologies, the Commission will ensure that the highest quality programming continues to be available to all Americans, not just those who are able to afford it.

Nowhere is the need for the elimination or liberalization of the Rule more obvious than in the largest media markets. The remainder of this section highlights competition in Chicago, where Tribune owns a grandfathered newspaper-TV-AM combination, and South Florida, where Tribune owns, at least temporarily, a newspaper-TV combination. These markets are discussed in detail to illustrate in real terms the competitive conditions in the larger U.S. media markets. As detailed below, competition in these markets is intense, involving large, well-financed media companies, many of whom control multiple outlets to the viewing/listening audience. This competition belies any suggestion that Tribune's existing newspaper-television combinations could somehow dominate these markets, either economically or in the marketplace of ideas.

A. The Chicago Marketplace.

In Chicago, Tribune indirectly owns and operates WGN-TV, Channel 9, WGN(AM), ChicagoLand Television News ("CLTV"), a 24-hour cable news channel, and publishes the <u>Chicago Tribune</u> as well as <u>Exito</u>, a weekly Spanish-language newspaper. A review of the Chicago competitive landscape reveals intense competition involving virtually every major media player in the country, including TCI, CBS/Westinghouse, General Electric/NBC, Disney/ABC and Fox.[26] Moreover, the Chicago marketplace represents a microcosm of the developments in the media marketplace since the Rule was adopted and vividly illustrates what an anachronism the Rule is today. Virtually every one of these major media competitors directly or indirectly controls several other media outlets to the viewer/consumer -- combinations that would not have been approved under the Commission's mindset in 1975

Television Competition: WGN-TV competes with the VHF owned and operated affiliates of CBS, NBC and ABC and the UHF owned and operated affiliate of Fox Television These stations have well-established news departments that collectively produce 105 hours of local television news programming each week. In addition, each of the networks owns several other media outlets:

> CBS/Westinghouse: In addition to owning WBBM-TV. Channel 2, which tied for third in audience ratings among television stations in the market, CBS also owns 5 FM and 3 AM radio stations in the Chicago market.[27] WBBM-TV had a total day, total television household share of 9 and an average weekly circulation of 76 in May 1998. The CBS radio stations include WBBM(AM) and WMAQ(AM), the two 50,000 watt all-news stations in Chicago. CBS thus controls a substantial local news franchise in the market. It airs 27.5 hours per week of local news and 20 hours per week of national news programming on WBBM-TV in addition to the multiple hours per week of national and local news programming on each of its news radio stations.

> NBC/General Electric: In addition to owning WMAQ(TV), Channel 5, the second ranked television station that airs 23.5 hours of local news and 19 hours of national

[26] AT&T recently announced its intention to acquire TCI, thus creating an even more powerful presence in the Chicago market with the ability to provide even more comprehensive telecommunications services to consumers.

[27] CBS received a permanent waiver to own WBBM(TV) plus 2 AM (both 50,000 watt all news stations) and 2 FM stations. Stockholders of Infinity Broadcasting Corporation, 12 FCC Rcd. 5012 (1996). It received a temporary waiver to own the additional 3 FM and 2 AM stations conditioned on the outcome of the Commission's review of the one-to-a-market rule. Id. ¶¶ 95.97.

news programming each week, NBC also programs and has significant ownership interests in two other news outlets to Chicago viewers -- CNBC and MSNBC -- which are both carried on virtually all of the cable systems serving the Chicagoland area.[28] This combination of interests also gives NBC a substantial news franchise in the market. WMAQ earned a total day, total television household share of 17 with an average weekly circulation of 88 in May 1998.

ABC/Disney: In addition to owning WLS-TV, Channel 7, the number 1 television station in the market that broadcasts 27.50 hours of local news and 19.50 hours of national news programming each week, ABC/Walt Disney also owns one FM and 2 AM stations in the market, including WLS-AM, a popular 50,000 watt talk station. WLS-TV had a total day, total television household share of 18 with an average weekly circulation of 87 in May 1998.[29] In addition, Disney also owns the ESPN family of basic cable networks, which are carried on cable systems throughout the area.

Fox/News Corp.: In addition to owning WFLD, Channel 32. the fifth ranked television station that broadcasts 22 hours of local news programming each week, Fox also owns several other outlets, including the Fox News Channel and the FX basic cable network. WFLD had a total day, total household share of 8 and an average weekly circulation of 89 in May 1998. Fox also has a significant ownership interest in Fox Sports Chicago, one of several regional sports programming channels it has ownership interests in across the country." Fox Sports Chicago earned a total day, total household share of 2 with an average weekly circulation of 37 in May 1998. These local or regional cable sports channels, driven by the dual income stream of license fees and advertising revenues, have been increasingly successful in securing local sports programming rights.

In addition to these four network owned and operated stations, the Chicago television market has several other significant competitors, including several owned by well-financed group operators. These other stations include:

WTTW, Channel 11: The country's most watched local PBS station, WTTW airs 10 hours of local news plus 12.5 hours of national news programming each week.

---

[28] NBC's cable networks are programmed to direct viewers to switch to their local NBC affiliates for regularly-scheduled local newscasts,

[w] ABC recently announced plans to acquire WTAU(AM), Zion, Illinois, thus increasing its radio holdings to 1 FM and 3 AMs.

[30] Fox Sports Chicago is a partnership between Fox and TCI/AT&T, which controls approximately 85 percent of the Chicagoland cable market.